Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

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The Honorable John Whitmire
Chair, Criminal Justice Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Letter Opinion No.97-087

Re: Validity of policies of the Houston Independent School District pertaining to employee reports (ID# 39510)

Dear Senator Whitmire:

You have asked whether a recently adopted "Whistleblower Policy" of the Houston Independent School District ("HISD") violates either article I, section 8 of the Constitution of Texas or the First Amendment to the Constitution of the United States. The policy establishes procedures for employees to report alleged violations of law, unethical conduct, and other wrongdoing to school district authorities. We cannot say that the policy facially violates either constitutional guarantee, particularly in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Moore v. City of Kilgore*, 877 F.2d 364 (5th Cir. 1989). However, we note that it might be possible to apply such a policy in an unconstitutional manner, and will outline the applicable standards so as to make clear the potential difficulties in enforcing the policy.

The guidelines at issue here require that employees make reports within three possible "avenues"—first-line supervisors, the HISD Employee Hotline, or the Office of Chief of Staff for Business Services. *See* HOUSTON INDEP. SCH. DIST., REVISIONS TO BOARD POLICIES AND ADMINISTRATIVE PROCEDURES REGARDING WHISTLEBLOWER PROVISIONS--SECOND READING 4 (1997). They require that "[a]ll reports on matters of private concern" be made in this manner, and that "any reports made . . . on matters of public concern" not disrupt the workplace or the educational process. *Id.* at 8. An explicit disciplinary provision in an earlier set of guidelines was withdrawn by HISD in its revision of this proposal.

With respect to the first set of guidelines, you suggested that under a rigorous interpretation of the guidelines, "even casual complaints to friends, co-workers and the press could subject HISD employees to very severe disciplinary action," and that in consequence "the ability of employees of HISD to comment on matters of general interest involving the school system would be greatly compromised." We agree that such concerns are serious, and do implicate free speech issues under both article 1, section 8 and the First Amendment. While the explicit sanctions have been withdrawn, the possibility of sanctions under the revised guidelines remains. Accordingly, the concerns you have expressed, while perhaps diminished, still remain.

That public employees have a right like other citizens to express personal opinions about matters of public concern is well established. The law was not always thus. As Justice White remarks in his opinion for the Court in *Connick v. Meyers*, the law for a long time was expressed by Justice Holmes's apothegm, "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Connick v. Meyers*, 461 U.S. 138, 143-44 (1983), (citing *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (Mass. 1892)). However, a series of Supreme Court cases, culminating in *Pickering v. Board of Education*, 391 U.S. 563 (1968), has firmly established that teachers, and other public employees, may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [entities] in which they work." *Pickering*, 391 U.S. at 568.[1]

The courts do, however, acknowledge that the state has a potential interest as employer in the speech of its employees which it does not have with respect to the speech of private citizens. Thus, in *Connick*, the United States Supreme Court held that an assistant district attorney in New Orleans who had circulated a questionnaire concerning office policy to her fellow employees could be fired without infringing on her First Amendment right of free expression. In his opinion for the Court, Justice White wrote, "[T]he State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Connick*, 461 U.S. at 140, (citing *Pickering*, 391 U.S. at 588).

Connick distinguishes speech on matters of public concern from that on matters of personal interest:

> We hold . . . that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147.

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[1]While you have asked about both the First Amendment and article I, section 8 of the Texas Constitution, our analysis will concentrate on First Amendment cases. Article I, section 8 has been held to protect speech more broadly than the First Amendment. *Davenport v. Garcia*, 834 S.W.2d 4, 8 (Tex. 1992). Accordingly, a denial of free speech under the First Amendment is *a fortiori* a denial of free speech under article I, section 8. *Alcorn v. Vaksman*, 877 S.W.2d 390, 401 (Tex. App.--Houston [1st Dist.] 1994). However, there is no implied private right of action for damages under article I, section 8. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 144 (Tex. 1995). Given that violations of the First Amendment do constitute an actionable tort, however, it would not be prudent for a political subdivision to assume that freedom from liability under article I, section 8 made such action risk-free.

In assessing the First Amendment claim of a discharged public employee, the United States Court of Appeals for the Fifth Circuit makes a three-step analysis:

> To prove a retaliation claim cognizable under the First Amendment, [the discharged employee] must (1) show that his speech was constitutionally protected, *i.e.*, that it involved a matter of public concern; (2) that his interest in commenting on the matters of public concern outweighs the public employer's interest in promoting efficiency; and (3) that his speech was a motivating or substantial factor in the termination decision.

Cabrol v. Town of Youngsville, 106 F.3d 101, 108 (5th Cir. 1997).

While the relevant test is a "fact specific balancing test," *Boddie v. City of Columbus*, 989 F.2d 745, 750 (5th Cir. 1993), "[t]he question of the protected status of speech is one of law." *Cabrol*, 106 F.3d at 109. Generally, whether speech addresses a public concern is judged by its content, form, and context. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1050 (5th Cir. 1996).

The speech at issue in the guidelines, however, is what is popularly known as "whistleblower" speech, and genuine "whistleblowing" has repeatedly been characterized by the Fifth Circuit as treating matters of public concern. Thus, in *Schultea v. Wood*, 27 F.3d 1112, 1119 (5th Cir. 1994), *superseded on other grounds*, 47 F.3d 1427 (5th Cir. 1995), the court held that the letters for which a former city police chief asserted he was demoted "relate[d] to a matter of public concern—the possibly criminal act committed by a public official." Similarly, the assertion of a fire fighter that staffing shortages affected fire department performance was held to implicate public concerns: "If staffing shortages potentially threaten the ability of the Fire Department to perform its duties, people in the community want to receive such information. The public had an interest in hearing [the fire fighter's] speech." *Moore*, 877 F.2d at 370. As Judge Wisdom wrote in *Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994), "[t]here is perhaps no subset of 'matters of public concern' more important than bringing official misconduct to light."

We do not believe that such requirements as those at issue here facially violate the free speech rights of HISD employees. We note that, in *Moore*, 877 F.2d 364, a majority of a panel which had unanimously found the application of a regulation on employee speech unconstitutional nevertheless declined to find the regulation facially unconstitutional. The regulation in question forbade fire fighters from "furnishing information relative to department policy, practices, or business affairs except as authorized by the Chief of the Department." *Id.* at 368.

The panel majority wrote:

> A fire department must have the authority to sanction its workers for releasing confidential facts that will compromise on-going investigations or business negotiations; for spreading malicious gossip about co-workers; for

> misrepresenting departmental positions; for lying; or for acting without permission as official spokespeople for the department.

Id. at 392. Given the logic of *Moore*, and *Connick*'s assertion, following Justice Powell, that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs," *Connick*, 461 U.S. at 151, we cannot assert that the HISD regulations *per se* violate the United States Constitution.

Nor, despite the suggestion of the Houston Federation of Teachers in their memorandum attached to your April 21, 1997, letter, do we believe that a court would hold them to violate article I, section 8 of the Texas Constitution. The most comprehensive assertion by the Texas Supreme Court of the independent authority of article I, section 8 is *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), which overruled a judicial gag order because "a prior restraint on expression is presumptively unconstitutional." *Id.* at 10. If we analogize from *Moore*, however, this presumption is of little value to an argument that policies like the one at issue are unconstitutional. The *Moore* majority explicitly found that the Kilgore policy was not a prior restraint:

> Nor, finally, is the rule a prior restraint. The department does not pretend to have authority to gag its employees before they speak. It claims the right to fire, demote, or suspend them after they speak. That is not a prior restraint; it is an after-the-fact sanction.

Moore, 877 F.2d at 392.

The policy at issue here is no more a prior restraint, on that argument, than the Kilgore Fire Department directive. Accordingly, it does not come within the terms of *Davenport*.

While *Moore* strongly implies that such a policy is not facially unconstitutional, it and other cases we have discussed also make clear that the application of such policies, particularly in the context of the reporting of official misconduct, may well lead to constitutional difficulties. Thus, in *Moore*, the panel as a whole rejected the argument that a fire fighter's comment on a matter of public concern, namely alleged under-staffing, could subject him to termination because, as the city manager viewed it, "a public employee could either function within the no-speech rules or [he] could leave." *Moore*, 877 F.2d at 374. Similarly, the Fifth Circuit has implicitly rejected a county's defense that an investigator was insubordinate for writing a letter to the commissioners court concerning his wife's allegations of sexual harassment in the sheriff's office. *Davis*, 40 F.3d 777.

We do not question that political subdivisions may dismiss employees for disruption and insubordination. Nor are we persuaded by the Federation of Teachers' argument that only acts by employees which rise to the level of Penal Code violations are sufficiently disruptive to trigger disciplinary action. We know of no case law to that effect, and cannot reconcile such a view with case law applying the *Connick* test. *See, e.g., Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir. 1993) (no constitutional tort in firing police officer for refusing to stop independent investigation of police

chief); *Cabrol*, 106 F.3d 101 (no constitutional tort in firing city employee for refusing to remove cock-fighting chickens from his yard). However, we do caution against, for example, any supposition that reports to third parties are *per se* disruptive, or that speaking on matters that may in part be private concerns is for that reason not constitutionally protected.

Courts are inclined to examine closely claims that speech by public employees on matters of public concern is disruptive or insubordinate, and have not looked favorably upon arguments that failure to follow a directive not to exercise First Amendment rights, without more, constitutes disruption or insubordination. Thus, in *Moore*, it was not sufficient, as we have noted, for the Kilgore fire department to recite its regulation, though that regulation was constitutional. Nor, in *Davis*, did the Fifth Circuit uphold the claim that Ector County could fire the plaintiff for insubordination because in writing to the commissioners court he "had defied [the district attorney]" and had "enmesh[ed] [his employer] in the private affairs of his wife." *Davis*, 40 F.3d at 780-81.

Moreover, while *Connick* and its progeny do make a distinction between speech on matters of private concern and on matters of public concern, and generally confer First Amendment protection on speech about matters of public concern, as we have noted, it does not follow from this that any speech motivated in part by private concerns is unprotected. In *Thompson v. City of Starkville*, 901 F.2d 456, 463 (5th Cir. 1990), the court held, "The existence of an element of personal interest on the part of an employee in his or her speech does not . . . dictate a finding that the employee's speech does not communicate on a matter of public concern." The reason for this is made plain by *Moore*: "[M]ixed motivations are involved in most actions we perform everyday; we will not hold [the discharged employee] to herculean standards of thought and speech, ever [sic] assuming [his] motivations were mixed." *Moore*, 877 F.2d at 371-72. In determining whether the speech that allegedly caused an adverse employment decision dealt with a matter of public concern, courts will "examine the form, content, and context of the statement." *Davis*, 40 F.3d at 782. While "a speaker's primary motivation may be considered" in this regard, *id.*, "a proper inquiry does not elevate motive to a determinative factor."

In summary, then, while we cannot say that the guidelines you have provided us violate either the First Amendment to the United States Constitution or article I, section 8 of the Texas Constitution, we caution that they may be susceptible of unconstitutional applications which could subject the Houston Independent School District to liability. In examining an adverse employment action which an employee asserts is caused by his exercise of the right to free speech on a matter of public concern, courts will consider, first, whether the speech dealt with a matter of public concern; if it does not, the employee has no constitutional claim. To determine whether the speech deals with a matter of public concern, courts will examine the form, content, and context of the statement. While the motivation of the speaker may be considered in this analysis, the fact that the speaker may have mixed motives does not mean *ex hypothese* that the speech is purely private and unprotected. Courts are inclined to view "whistleblower" speech—that is, assertions of governmental misfeasance or malfeasance—generally as dealing with matters of public concern. If the speech does deal with matters of public concern, the court will weigh the employee's interest in his free speech rights—an interest which is heightened when the speech concerns allegations of misfeasance or

malfeasance—with the interests of the employing agency in its efficient operation. The court will also consider the question of whether the speech was a cause of the adverse employment decision. In defending such an action, the political subdivision will have to make a showing of actual disruption or insubordination. The failure of an employee to follow such guidelines as those at issue here, without a more particular showing of disruption, would not appear on the basis of the case law we have examined to provide a sufficient rationale for such a defense. Accordingly, care must be taken in the application of such guidelines as these that sanctions be administered only when workplace efficiency, morale, and discipline are genuinely affected by employee speech.

SUMMARY

Guidelines on employee whistleblowing reports recently adopted by the Houston Independent School District are not facially unconstitutional. However, given the possibility of liability for an unconstitutional application of them, care must be taken in the application of such guidelines as these that sanctions be administered only when workplace efficiency, morale, and discipline are genuinely affected by employee speech.

Yours very truly,

James E. Tourtelott

James E. Tourtelott
Assistant Attorney General
Opinion Committee